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IN THE

SUPREME COURT

OF THE

UNITED STATES

Supreme Court U. S.
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JAMES H. McKENNEY, Clerk

OCTOBER TERM, 1902.

No. 366.

THE UNITED STATES FIDELITY AND GUARANTY COMPANY, PLAINTIFF IN ERROR,

vs.

THE UNITED STATES OF AMERICA, FOR THE USE AND BENEFIT OF THE GOLDEN PRESSED AND FIRE BRICK COMPANY, AND THE GOLDEN PRESSED AND FIRE BRICK COMPANY,
DEFENDANTS IN ERROR.

On Certificate from the United States Circuit Court of Appeals for the Eighth Circuit.

BRIEF AND ARGUMENT OF PLAINTIFF IN ERROR.

JAMES H. BROWN,
and
ANDREW W. GILLETTE,
Attorney for Plaintiff in Error.

IN THE

SUPREME COURT

OF THE

UNITED STATES

OCTOBER TERM, 1902.

No. 302.

THE UNITED STATES FIDELITY AND GUARANTY COMPANY, PLAINTIFF IN ERROR,

vs.

THE UNITED STATES OF AMERICA, FOR THE USE AND BENEFIT OF THE GOLDEN PRESSED AND FIRE BRICK COMPANY, AND THE GOLDEN PRESSED AND FIRE BRICK COMPANY, DEFENDANTS IN ERROR.

On Certificate from the United States Circuit Court of Appeals for the Eighth Circuit.

BRIEF AND ARGUMENT OF PLAINTIFF IN ERROR.

STATEMENT OF THE CASE.

This case is in this court on certificate from the Circuit Court of Appeals for the Eighth Circuit. It is an action at law upon a contract bond to recover from the surety a balance alleged to be due for ma-

terials furnished the contractor. The facts disclosed by the certificate are as follows:

On March 29, 1898, John A. McIntyre entered into a contract with the treasurer of the United States, acting for and on behalf of the government, for the construction of certain portions of the new mint building at Denver, Colorado. On April 11, 1898, said McIntyre, as principal, and The United States Fidelity and Guaranty Company, the plaintiff in error, as surety, entered into a bond, running to the United States of America, to secure the performance of said contract. Said bond contained the additional obligation required in such cases by the act of 1894 (28 U. S. Stat. at Large, 278), that such contractor "shall promptly make payment to all persons supplying him labor or material in the prosecution of the work provided for in such contract."

Said McIntyre subsequently entered into a subcontract with the defendant in error, The Golden Pressed and Fire Brick Company, for brick for the mint. Under this subcontract brick were delivered and payments on account thereof were made from time to time. On the first day of October, 1898, an account was stated between the brick company and McIntyre, and it was ascertained and agreed between them that a balance of $3,787 was then due and payable.

Thereupon, on said first day of October, 1898, and without the knowledge or consent of this plaintiff in error, two promissory notes of McIntyre were accepted by the brick company for this balance, one being for $1,275, payable in thirty days from said date, and one for $2,508.10 (a deduction of $3.90 be-

ing made for interest not earned), which latter note was dated back to September 15, 1898, and made payable sixty days after date, both said notes bearing interest at the rate of ten per cent. per annum from date until paid. The note for $1,275 was paid at maturity. The note for $2,508.10 was not paid.

Ignoring the note transaction, this suit was brought by the brick company in the name of the United States, as it is provided by the statute may be done, to recover an alleged balance of indebtedness on account of brick so sold and delivered.

The surety company, plaintiff in error, pleaded an *express contract* between the brick company and McIntyre, without the surety's knowledge or consent, for an extension of time of payment of said balance so due and payable on October 1, 1898, in consideration that notes for said indebtedness should be given, and that, in accordance with said agreement, said notes were executed, delivered and accepted as aforesaid. It also relied upon the *implied contract* for extension of time of payment resulting from the giving and acceptance of the notes.

It also pleaded that the balance of the alleged indebtedness sued for was a part and portion of the balance of $3,787 which was so due and payable by McIntyre to the brick company on October 1, 1898, the time for the payment of which had been extended by the brick company in the manner heretofore stated.

The surety company alleged that, by reason of such extension of time to its principal, without its consent, it was discharged from any and all further liability upon said bond, as respects the indebtedness sued for.

QUESTIONS CERTIFIED.

"*First*—Did the action of the brick company on October 1, 1898, in taking two promissory notes, one for the sum of $1,275.00 and the other for the sum of $2,508.10, for the amount of the brick company's account, then due and payable, one of said notes running for thirty days and the other for sixty days, and each bearing ten per cent. interest per annum from date, operate to discharge the United States Fidelity and Guaranty Company from its liability, assumed under the provisions of the aforesaid bond, to pay to The Golden Pressed and Fire Brick Company the amount of said indebtedness?"

"*Second*—Did the extension of the time of payment of the balance due from said McIntyre, on October 1, 1898, by the taking of two notes in the manner and form aforesaid, operate to discharge the United States Fidelity and Guaranty Company of its liability to pay the amount of said indebtedness to the brick company, irrespective of the question whether said guaranty company did or did not sustain an actual loss or damage on account of such extension?"

BRIEF OF THE ARGUMENT.

I.

The obligation of the plaintiff in error is that of suretyship, and in determining its liability to the brick company the rules of law applicable to contracts of suretyship in general are to be applied.

United States vs. American Bonding and Trust Co., 32 C. C. A., 420; 89 Fed., 925, 929-930.

United States vs. McIntyre et al., 111 Fed., 590, 597.

II.

The terms and extent of this obligation are to be ascertained by reading the bond in the light of the contract between McIntyre and the brick company. The bond alone does not contain all the surety's contract with the brick company.

Brown vs. Markland, 22 Ind. App., 652; 53 N. E., 295, 296, and cases cited.

Ulster County Savings Inst. vs. Young, 161 N. Y., 23; 55 N. E., 483

III.

The statutory bond in suit imposes upon the surety a dual obligation: (1) to the government, for the completion of the principal contract; (2) to laborers and material men, to see that they are promptly paid. These obligations are entirely separate and distinct.

United States for the use of Anniston Pipe and Foundry Co. vs. Natl. Surety Co., 34 C. C. A., 526; 92 Fed. Rep., 549.

United States to use of Fidelity Natl. Bank of Spokane vs. Rundle et al., 40 C. C. A., 450; 100 Fed. Rep., 400.

Griffith et al. vs. Rundle et al., 23 Wash., 453; 63 Pac. Rep., 199, 200.

Omaha Bldg. & Const. Co. vs. U. S. Fidelity & Guaranty Co., 116 Fed., 145.

United States vs. Freel, 92 Fed., 299; affirmed, 99 Fed., 237.

Dewey vs. State, 91 Ind., 173.

Conn vs. State, 125 Ind., 514; 25 N. E., 443.

Doll vs. Crume, 41 Neb., 655; 59 N. W., 806.

Kauffman vs. Cooper, 46 Neb., 644; 65 N. W., 796.

Lyman vs. City of Lincoln, 38 Neb., 794; 57 N. W., 531.

United States vs. Stratford (N. Y. Sup. Ct.), 65 N. Y. Supl., 1051, 1053.

Steffes vs. Lemke, 40 Minn., 27; 41 N. W., 302.

IV.

Any change whatever in the contract for which the surety is liable, made without his consent, will operate his discharge.

United States vs. Freel, 92 Fed. Rep., 299, 306, 307; affirmed, 99 Fed. Rep., 237.

Reese vs. United States, 9 Wall., 13, 21.

Bethune vs. Dozier, 10 Ga., 235.

V.

Extension of time of payment, if made without his consent, is such a change as will release a surety.

2 Brandt on Suretyship and Guar., section 342.

1 Story's Eq. J., section 326.

New Hampshire Sav. Bank vs. Colcord, 15 N. H., 119; 41 Am. Dec., 685.

Winne vs. Colo. Springs Co., 3 Colo., 155, 161.

Martin vs. Thomas, 24 How., 315.

Smith vs. United States, 2 Wall., 219.

VI.

If a creditor take the note of a debtor, payable at a future date, for a debt then due, he thereby extends the time of payment of, and suspends his right of action upon, the debt until the maturity of such note,

and thereby releases from further obligation any person who was bound as surety for the payment of such debt.

United States vs. Am. Bonding and Trust Co., 32 C. C. A., 420; 89 Fed. Rep., 925, 929-930.

Rees vs. Berrington, 2 Ves. Jun., 540; II White and Tudor's Lead. Cas. Eq., 1867, 1869.

See American cases cited to the same proposition in note Ibid., 1915.

Chickasaw Co. vs. Pitcher, 36 Ia., 593, 598.

Myers vs. Wells, 5 Hill (N. Y.), 463, 464.

Appleton vs. Parker, 15 Gray (Mass.), 175, 176.

Okie vs. Spencer, 2 Whart. (Pa.), 253, 257-8.

Hart vs. Hudson, 6 Duer., 305.

Norton vs. Roberts, 4 T. B. Monroe (Ky.), 491, 492, 494.

Fellows vs. Prentiss, 3 Den., 512, 518; 45 Am. Dec., 484, and see cases cited in note.

Templeman et al. vs. Tex. Brewing Co. (Tex., '96), 35 S. W. 935, 936-937.

Elyton Co. vs. Hood, 121 Ala., 373; 25 So. R., 745, 748.

Brooks vs. Wright, 13 Allen (Mass.), 72, 76.

Benson vs. Phipps, 87 Tex., 578; 29 S. W., 1061.

Andrews vs. Marrett, 58 Me., 539.

VII.

The implied agreement of the brick company for extension of time of payment of McIntyre's indebtedness was based upon a sufficient consideration.

Myers vs. Wells, 5 Hill (N. Y.), 463, 464.

St. Paul Trust Co. vs. St. Paul Chamber of Com. et al., 70 Minn., 486; 73 N. W., 408, 409.

Benson vs. Phipps, 87 Tex., 578; 29 S. W., 1061, and cases cited.

Drescher vs. Fulham, 11 Colo. App., 62, 66, 67-68.

VIII.

A surety is discharged by a change, made without his consent, in the contract for the performance of which he is bound, regardless of whether or not he is damnified by such change.

Miller vs. Stewart, 9 Wheat., 680, 702-703.

Rose's Notes on U. S. Reports, 314.

Reese vs. United States, 9 Wall., 13, 21.

Bethune vs. Dozier, 10 Ga., 235, 238.

Burley vs. Hitt, 34 Mo. App., 272, 276-277.

Norton vs. Roberts, 4 T. B. Monroe (Ky.), 491, 493.

Rees vs. Berrington, 2 Ves. Jun., 540; II White and Tudor's Lead. Cas. in Eq., 1867, 1869.

ARGUMENT.

I.

The First Question.

THE NATURE OF THE OBLIGATION OF THE PLAINTIFF IN ERROR.

To answer the first question propounded by the Circuit Court of Appeals necessitates a consideration of the nature of the liability of the surety upon the bond of the contractor for a government building or other public works to those who supply labor or materials to such contractor, under the obligation required by the statute, "that such contractor shall promptly make payment to all persons supplying him or them labor and materials in the prosecution of the work provided for in such contract."

The plaintiff in error insists that its obligation is the ordinary one of suretyship; that the three parties to the suit in the court below, the brick company, McIntyre and the surety company, stand in the relation of obligee, obligor and surety; that all the incidents connected with and growing out of that relation are present in this, as in any other contract of suretyship, and that, in determining the liability of plaintiff in error, the surety, to those furnishing materials or labor, the rules of law applicable to contracts of suretyship in general, are to be applied.

It is an elementary principle in the law of suretyship that *any change whatever in the contract for which the surety is liable, made without his consent, will operate his discharge*. It is in reliance upon this principle that the plaintiff in error claims it is released from liability to pay for the brick, the price of which is sued for in this action.

The contract, for the performance of which we were liable as surety, was to pay *promptly* for all brick furnished. This required that all bills for brick should be paid *when due*, without delay or extension of time. By the terms of McIntyre's contract with the brick company (which contract, construed together with the language of the bond above quoted, is the measure of our liability to the brick company) on October 1, 1898, the time of payment for all brick theretofore delivered had arrived. The account for brick was due and payable. The brick company could have then demanded its money from McIntyre, the principal on the bond, and, on his failure to pay, could have looked to his surety, the plaintiff in error.

If, instead of doing this, however, the brick company saw fit to make a new and different agreement with McIntyre as to time of payment for brick already delivered—if it entered into a valid and binding agreement for extension of time of payment—we say it thereby released the surety. We do not contend that mere indulgence—mere delay in collecting—would release the surety; but we do claim that a binding agreement for an extension of time of payment for a definite period, after the brick had been delivered and our obligation had become fixed and definite, had that effect.

Such an agreement was made on October 1, 1898. On that date the balance of McIntyre's indebtedness to the defendant in error, then due and payable, was ascertained, and his two promissory notes therefor were accepted, the one due in thirty, and the other in sixty, days. Under the authorities this had the effect to postpone the right of action on the debt until the maturity of the notes, and to extend the time of payment thereof for the same period. Thereby a new and different agreement as to time of payment was substituted for the original agreement, for the fulfillment of which we were surety. After the substitution of this new agreement, there was no further liability upon the original agreement, for that had ceased to exist; and, so far as this surety is concerned, there was no liability upon the new and substituted contract, for to that we were not party. Our only obligation was that McIntyre should "promptly make payment," which meant "at the appointed time," to wit, October 1. If another time of payment was substituted we were released.

The extent of the surety's obligation to laborers and material men is to be determined, in each instance, by the language of the bond, read in the light of the terms, as to payment, of such obligee's contract with the principal. It can not be determined from the bond alone what was the price of the brick, nor what would be prompt payment therefor.

> "The obligation of the bond is to be read in the light of the contract it is given to secure. The extent of the engagement entered into by the sureties must be measured by the terms of the

contract of their principal. The contract and bond are to be considered together."

Brown vs. Markland, 22 Ind. App., 652; 53 N. E., 295, 296, and cases cited.

"The liability of a surety is measured by his agreement and is not to be extended by construction. His contract, however, is to be interpreted by the same rules which are applicable to the construction of other contracts. The extent of his obligation must be determined by the language employed *when read in the light of circumstances surrounding the transaction.*"

Ulster County Savings Inst. vs. Young, 161 N. Y., 23; 55 N. E., 483.

The contract between McIntyre and the brick company was not, as contended in the court below, "a separate contract from the contract entered into by the defendant." On the contrary, it entered into and formed the very basis of the obligation of the defendant surety to the plaintiff brick company. Before the brick company contracted with McIntyre there surely was no obligation upon the part of the plaintiff in error to the brick company. As soon, however, as it made its contract with McIntyre, or rather, as soon as brick were delivered under such contract, its obligation as surety became fixed and definite—that McIntyre should "promptly make payment" for such brick at the price fixed in such contract.

It can not be said that its obligation is to pay for labor and material furnished, at all events, under all circumstances, and regardless of all transactions or agreements between the laborers or material men and

the contractor, after the labor or material has been furnished.

On the contrary, its obligation is, to the same effect as if so written at length in the bond, that for all labor or materials so furnished, and in strict accordance (as to price and time of payment) with the agreement under which they were furnished, the contractor to whom they were furnished will "promptly make payment." If it had been the intent of Congress to require a bond conditioned for payment at all hazards, under all circumstances, the qualifying word "promptly" would have been omitted. This word was used advisedly, and must, in determining the nature of the obligation in which it appears, be given its usual and ordinary meaning.

The word "promptly" means "in a prompt manner." (Standard Dict.)

What, then, would be a "prompt manner" of making payment for materials furnished?

> Prompt: "Ready and quick to act *as occasion demands.*" (Webster.)
>
> "Acting, or ready to act, *at once, when occasion demands.*"
>
> "*Taking place at the appointed* or fitting *time.* Said of things or acts, as a prompt arrival." (Standard Dict.)

Thus, it was said by the Circuit Court of Appeals for the Second circuit, in construing this very provision for prompt payment in a bond given by a government contractor:

> "Payment when due is prompt payment."
>
> Mullin vs. U. S. for use Chapin-Hall Lumber Co., 109 Fed., 817, 819.

(Incidentally it will be observed in the case last cited that the court, in order to ascertain the obligation of the surety to the material men, and whether there had been a breach of that obligation, was obliged to look, and looked, *to the terms of their contract with the principal contractor*. There is never a hint in the case, from beginning to end, that the obligation of the surety was absolute, to pay at all events, at any time, and under all circumstances, or that the relationship was any other than the ordinary one of suretyship, and governed by the rules applicable to such relation.)

The very essence of promptness in doing an act is that it shall be done "*at once, when the occasion demands*," and not at a later time. An act is promptly done only when it is done "at the appointed time." In the case at bar, a payment made at the appointed time, October 1, 1898, would be promptly made. A payment made at any subsequent time would not be promptly made. Thus it is seen that *the obligation of this surety was that its principal should pay for the brick furnished, at the price agreed upon, and promptly at the time agreed upon* . For such payment, and such only, was it bound. Only by reference to the contract under which the brick were furnished can it be learned what was the time agreed upon for payment for the brick. The contract and the bond must be construed together.

The statute did not seek to impose upon the sureties required on this bond, an obligation in favor of material men who might become obligees thereunder, broader than, or governed by rules different from those governing the ordinary obligation of a surety. On the contrary, the obligation required by

the statute is narrowed and restricted, so far as the rights thereunder of those furnishing material are concerned, to the one matter of payment, and, again, as to the payment itself they are narrowed and restricted to the *time* of payment, that it shall be *prompt*. As regards the government, the obligation of the bond is very broad—that McIntyre "shall perform all the undertakings stipulated by him to be performed." As regards those furnishing material the obligation is, not that he shall perform his contracts with them in every particular, but, as to the one particular matter of payment, that he shall make such payment *promptly*.

Now, this obligation to pay promptly, as we have seen, means to pay when due. Upon the 1st day of October, 1898, the amount then due and payable under this contract was ascertained and agreed upon between McIntyre and the brick company. His contract called for its payment *at that time*. The obligation of his surety was that it should be paid *at that time*. Instead of this, however, other times of payment were agreed upon. If this was not a substitution of other and different contracts in the place of the one for the performance of which the surety was bound, we are at a loss to know what would constitute such a substitution.

Upon the general proposition that a change in the contract, made without the knowledge and consent of the surety, discharges the surety, we presume there will be no controversy. Nor is there any conflict in the authorities upon the proposition that taking the note of a debtor, payable at a future day, for a debt then due, extends the time of payment of, and

suspends the right of action upon the debt, until the maturity of such note, and releases from further obligation any person who was bound, as surety, for the payment of such debt. The question is whether these principles are applicable to this case. We say they are.

In two suits by material men upon bonds containing this statutory provision for prompt payment, this principle of release by change of contract—by change of contract between the principal and the material man—has been held to control. In others it has been decided that changes in the principal contract with the government can not release the surety from liability to a material man. Only changes in such material man's own contract can have this effect. In no case has it been decided, or even intimated, that the contract of the surety on such bond, as concerns his liability to a material man, in any wise differs from the usual contract of suretyship, or that it is not to be construed by the law of suretyship.

In a case very similar in its facts to the one at bar, defendant was surety on the bond of a government contractor for the construction of certain hospital buildings at Fort Meyer, Va., which bond contained the provision required by statute, for prompt payment for labor and materials. Plaintiffs furnished materials to the contractor, and, when the time of payment therefor had arrived, without the knowledge of the surety, took the promissory notes of the contractor for the amount due. The notes not being paid, the material men brought suit upon the bond for the balance of indebtedness alleged to be due. The surety claimed that it was released from further lia-

bility by the extension of the time of credit to the contractor, resulting from the taking of the notes. Upon these points the Circuit Court of Appeals for the Fourth circuit said:

> "The two remaining assignments of error we will consider together, first taking up the prayer granted by the lower court—'that the contract of suretyship should be strictly construed, and not extended by implication.' There can, in our judgment, be no doubt of the correctness of this statement of the law. *When the rights of sureties are involved, they are only bound by the contract which they have signed, and have a right to look to a literal and strict construction of the same, and not that such contract shall be extended*, either by implication, or as a consequence of what others may do in matters of which they have no notice and with which they are not connected. (Miller vs. Stewart, 9 Wheat., 680-702; Leggett vs. Humphreys, 21 How., 66; Reese vs. United States, 9 Wall., 13.) * * *
>
> "The doctrine is so well settled as to the effect on the rights of sureties of a creditor changing, without the consent of the surety, his securities, and extending the time of payment of, or in any manner contracting to enlarge, the same, for a fixed and definite period, that it seems almost useless to state the same, or cite authorities in its support. It is that *a surety is bound by the terms of his contract, and if a creditor, by agreement with the principal debtor, without the concurrence of the surety, varies its terms by the enlargement of the time of performance, the surety is discharged.* (Citing cases.)
>
> *"It is well settled that taking a bill or note payable at a future day, for an existing debt, implies an agreement to wait until the instrument matures, which will discharge all the parties who*

are secondarily liable for the payment of the debt, as sureties or guarantors." (Citing cases.)

United States vs. American Bonding and Trust Co., 32 C. C. A., 420; 89 Fed. Rep., 925, 929-30.

This case is authority for all our propositions: that the contract of the plaintiff in error is one of suretyship, and, as such, to be strictly construed; that extension of time of payment discharges a surety; that the taking of a note for a debt then due, has the effect, in law, to extend the time of payment to the maturity of the note, and to release a surety. The trial court, in holding the surety discharged by the taking of the notes, seemed to think such effect depended, to some extent, upon the fact that the last set of notes did not mature until after the termination of the contract. (See opinion of Circuit Court in United States to use, etc., vs. American Bonding and Trust Co., 89 Fed. Rep., 921.) The Circuit Court of Appeals, however, in affirming the judgment, does not base its decision in the least upon this fact. On the contrary, its opinion is squarely bottomed upon the general principle of release by extension of time. In the case under discussion the surety was as effectually released when the first set of notes was taken as when the last notes, maturing after the expiration of the contract, were accepted. We submit that this decision in the Fourth circuit correctly states the law applicable to the case at bar.

In another suit, brought by the assignee of the stone contractor against McIntyre and the plaintiff in error, upon the very bond now in suit, the plaintiff

in error relied upon the defense of change in the stone contract. In holding the surety company released because of such changes, the Circuit Court for the District of Colorado (Judge Riner presiding) said:

> "I think it is fundamental that any change in the contract for which the surety is liable, made without his consent, will operate his discharge. The surety assures the performance of a certain contract, and his liability is conditioned inflexibly upon the continuance of that particular contract. As stated by a distinguished judge: 'He who would charge a surety for his principal's breach of contractual duty must travel without deviation the way pointed out in the contract, however ironbound it may be; for there is for the surety in the performance of his bond no equity nor liability beyond its strict terms.'"
>
> U. S. vs. McIntyre et al., 111 Fed. Rep., 590, 597.

In a case arising in the Second circuit it was decided that the surety upon a bond given in pursuance of this statute to secure the completion of a contract with the government for the building of a dry dock at the Brooklyn navy yard, was released from all liability to the government, by reason of a change in the location of the dock. When sued by the government, upon the bond, the surety pleaded such change in the contract as operating his release. The opinion of the circuit judge states very clearly the general principle for which we contend, and cites many authorities in its support:

> "In considering whether this change releases the sureties, it should be remembered that broad,

liberal and equitable considerations may not prevail, but, rather, that the rule is technical and strict. It has been said that sureties are favorites of the law. Ludlow vs. Simond, 2 Caines, Cas., 1, 29. It may be said, better, *that the surety assures the performance of a certain contract, and his liability is conditioned inflexibly upon the continuance of the very terms of that contract.* If the principal parties thereto change their agreement, there springs into being a new contract, to which the sureties are strangers; and if the guaranty of its performance is desired, it must be obtained *de novo.*

> United States vs. Freel (Cir. Ct., E. D.; N. Y., Feb. 15, 1899), 92 Fed. Rep., 299, 306-307.
>
> Affirmed by the United States Circuit Court of Appeals for the Second circuit, 99 Fed., 237.

If we are right in our premise that the obligation of plaintiff in error to the brick company is one of suretyship, governed by the same law which governs its obligation to the government, then it necessarily follows, from the case last cited, that if a change in the principal contract releases the surety from further liability to the government, a change in time of payment for materials, made after the obligation has become fixed and definite, will equally release the surety from further liability to pay for such materials. The rule is the same in both cases.

> *"When the obligation of the surety is for the debt of the principal, if the time of payment is, without the consent of the surety, by a binding agreement between the creditor and the prin-*

cipal, extended for a definite time, the surety is discharged. The reason is that the surety is bound only by the terms of his written contract, and if those are varied without his consent, it is no longer his contract, and he is not bound by it."

2 Brandt on Suretyship and Guar., section 342.

"If the creditor, without any communication with the surety and assent on his part, should afterward enter into any new contract with the principal, inconsistent with the former contract, or should stipulate in a binding manner, upon a sufficient consideration, for further delay and postponement of the date of payment of the debt, that will operate in equity as a discharge of the surety."

1 Story's Eq. J., section 326.

"We have repeatedly recognized the rule, originating in equity but now generally held to be equally a rule at law, that *a binding contract for further delay of the time of payment, made between the creditor and the principal, without the consent of the surety, discharges the latter* from the obligation of the contract."

New Hampshire Sav. Bank vs. Colcord, 15 N. H., 119; s. c., 41 Am. Dec., 685.

Martin vs. Thomas, 24 How., 315.

Smith vs. United States, 2 Wall., 219.

Winne vs. Colo. Springs Co., 3 Colo., 155.

"In truth, there is no conflict in the decisions, and those to which I have referred conclusively show that *a negotiable note taken from a*

debtor, even as between the original parties, is a conditional satisfaction of the debt which formed its consideration, and that *in respect to a surety*, whether guaranty or endorser, *whose assent to the transaction is not proved, the satisfaction which it works, and of which it is evidence, is absolute.*"

Hart vs. Hudson, 6 Duer, 305.

Rees vs. Berrington (leading case), 2 Ves. Jun., 540; II White and Tudor's Lead. Cas. Eq., 1867, 1869.

See American cases cited to the same proposition in note Ibid., 1915.

Myers vs. Wells, 5 Hill (N. Y.), 463, 464.

Appleton vs. Parker, 15 Gray (Mass.), 175, 176.

Okie vs. Spencer, 2 Whart. (Pa.), 253, 257-8.

Norton vs. Roberts, 4 T. B. Monroe (Ky.), 491, 492, 494.

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Templeman et al. vs. Tex. Brewing Co. (Tex., '96), 35 S. W., 935, 936-937.

Elyton Co. vs. Hood, 121 Ala., 373; 25 So. R., 745, 748.

Brooks vs. Wright, 13 Allen (Mass.), 72, 76.

Benson vs. Phipps, 87 Tex., 578; 29 S. W. R., 1061.

Andrews vs. Marrett, 58 Me., 539.

THE DOUBLE FUNCTION OF THE BOND.

It has already been noted that the bond required *by the statute has a double aspect—is intended* to perform a double function. As regards its first obligation, that securing the performance of McIntyre's contract with the government, it is in the usual form, the three parties—obligee, obligor and surety—are all expressly named, and the contract whose performance is secured was, at the time the bond was executed, already made, and is expressly therein referred to. As concerns its second obligation, that for the protection of those persons who, by supplying labor or material, may become obligees, it differs from the usual contracts of suretyship only in the respect that such obligees are not therein described by name, but, rather, as belonging to a class, the individuals comprising which are not, at the time of the execution of the bond, ascertained. Nor is it then know what will be the terms and time of payment afterwards agreed upon between the principal upon the bond and such unascertained obligees for such labor and material as they may furnish.

But we contend that the instrument is none the less a surety bond because these obligees are unascertained when it is entered into. They are described in the bond as "all persons suplying him [the contractor] or them [contractors] labor and materials in the prosecution of the work provided for in such contract." That is sufficiently certain which can be made certain. Whenever a person, by supplying labor or material, brings himself within this description, he is

as much an obligee and entitled to the benefits of the bond, as if expressly named therein as such.

As to such unascertained obligees and the liability of the surety to them, the bond may be said to be, at the time of its execution, ambulatory. As soon, however, as the principal upon the bond enters into a contract with some person for labor or materials, this ambulatory obligation or liability becomes at once definite, fixed and certain, both as to the personality of one obligee and as to the terms and time of payment for such labor or material as he may furnish. A new obligee arises as often as another agreement for labor or materials is made. There will be as many different obligees as there are different persons who supply labor and material to the contractor.

The particular obligation of the surety to each separate obligee is as separate and distinct from his obligation to the government, and from his obligation to the other obligees, as if embodied in a separate instrument; and circumstances may arise, or transactions be had, between the principal and the government, or between the principal and some one obligee, the effect of which will be to entirely discharge the surety from further liability to the government or to that particular obligee, without in the least affecting the rights of the others.

The obligation of the surety under the bond in question, to the government, is for the entire performance according to its terms, of the contract therein referred to of its principal, McIntyre, for the erection of the mint. It is so written in the bond. No dealings which he, McIntyre, might have with any person supplying labor or material can in the least change or

modify this liability. Only subsequent dealings between the contractor and the government can have this effect.

The obligation of the plaintiff in error to those other persons who may, by supplying labor or materials to the contractor, become obligees, can not in the least be changed or modified by any subsequent transactions between the contractor and the government. It can be modified or extinguished by subsequent dealings between such obligees themselves and the contractor.

This dual character of the bond in question, and the distinction between, and entire independence, each of the other, of the two separate obligations of the surety therein, have been recognized in several cases. This distinction and independence were first pointed out by the Court of Appeals for the Eighth circuit, in the case of United States for the use of Anniston Pipe and Foundry Company vs. National Surety Company, 34 C. C. A., 526; 92 Fed. Rep., 549, in the opinion in which case it was said:

> "The bond which is provided for by the act was intended to perform a double function—in the first place, to secure to the government the faithful performance of all obligations which a contractor might assume towards it; and in the second place, to protect third persons from whom the contractor obtained materials or labor. * * * The two agreements which the bond contains, the one for the benefit of the government and the one for the benefit of third persons, are as distinct as if they were contained in separate instruments, the government's name being used

as obligee in the latter agreement merely as a matter of convenience."

In the case referred to, the sureties claimed exemption from liability to material men because the government and the contractor, without the surety's knowledge, had made some changes in the principal contract, subsequent to the execution of the bond. It was held that, while possibly the changes made would release the surety from further liability to the government, such changes could not operate to relieve the surety from liability to material men. Only changes in the agreement under which the materials were furnished could have this effect. The court held that laborers and material men may rely confidently for protection upon the security provided by the statutory bond,

> "unless they see fit, *by their own dealings with the contractor*, to relinquish the benefit of the security."

This language expressly recognizes the possibility that laborers and material men, by their own course of dealing with the contractor, may release the surety from liability to them. We submit that nothing which they can do and no arrangement which they can make with the contractor can be more effective to produce this result than to extend the time of payment for materials, after the same have been delivered and the time of payment has arrived.

The case last cited has been quoted with approval and followed in several later cases, until the law is settled that changes in the principal contract can have

no possible effect on the liability of the surety, under the other obligation of the bond, to material men.

United States to the use of Fidelity Natl. Bank of Spokane vs. Rundle et al., 40 C. C. A., 450; 100 Fed. Rep., 400.

Griffith et al. vs. Rundle et al., 23 Wash., 453; 63 Pac. Rep., 199, 200.

Omaha Bldg. and Const. Co. vs. U. S. Fidelity and Guaranty Co., 116 Fed., 145.

United States vs. Stratford (N. Y. Sup. Ct.), 65 N. Y. Supl., 1051, 1053.

United States vs. Freel (*supra*), 92 Fed., 299; affirmed by Court of Appeals. 99 Fed., 237.

Likewise, under similar state statutes it has been held that the right of action of a material man for materials furnished the contractor, can not be defeated or abridged by any transaction between the state and such contractor, after the bond has been executed.

Dewey vs. State, 91 Ind., 173.

Conn vs. State, 125 Ind., 514; 25 N. E., 443.

Doll vs. Crume, 41 Neb., 655; 59 N. W., 806.

Kauffman vs. Cooper, 46 Neb., 644; 65 N. W., 796.

Lyman vs. City of Lincoln, 38 Neb., 794; 57 N. W., 531.

Steffes vs. Lemke, 40 Minn., 27; 41 N. W., 302.

SOME OBJECTIONS ANTICIPATED AND ANSWERED.

It was contended by the brick company in the court below, and will doubtless be argued here, that the obligation of the surety company in this case is not that of a surety, and, as such, to be strictly construed; but, rather, that of an insurer, and, as such, to be liberally construed. This is claimed for the reasons that the bond was given in pursuance of a statute, instead of by mutual agreement; because the surety on the bond is a corporation, instead of an individual; because, at the time the bond was written, those who might become obligees thereunder were not ascertained; because, at the time the bond was written, the terms and amounts of the obligation thereunder to such obligees was not definitely ascertained; because the surety had no voice in the making of the contracts for materials, for the prompt payment for which by its principal it pledged itself.

It was urged that this surety had no right to be heard as to the terms upon which McIntyre should buy brick, either as to price or time of payment; that these were matters entirely between McIntyre and the brick company, in which we had no concern, that we are not party to that contract, and hence that we can not complain if its terms were changed, even after the brick were delivered. We freely admit the first part of this proposition. Unlike other sureties, we had no right to a voice, in the first instance, as to what contracts McIntyre should make for labor or materials, either as to the persons with whom he might contract, as to the prices to be paid, or as to the time and manner of payments. He might agree

to pay ten dollars per thousand for brick worth only six dollars, and he might agree to pay on delivery, every thirty days, or in sixty or ninety days, and we would be bound, under our bond, by his agreement, to see that all brick delivered were paid for promptly, in accordance therewith.

Neither do we claim that, having made a contract for labor or materials, any new or different contract afterwards substituted, *for labor or materials thereafter to be furnished*, would release us. For instance, if, during the progress of the work, it should be found that the materials contracted for were not of the kind and quality required, and another kind or quality, at a different price, and with different terms of payment, were substituted, we do not claim our obligation would be on the first contract only, or that, even as to that, we would be released by the fact that it had been superseded by another. We would remain obligated, as surety, that McIntyre should "promptly make payment" for all materials furnished under the first contract, according to *its* terms, and for all furnished under subsequent and substituted contracts, according to *their* terms.

What we do contend is, that, once McIntyre entered into a contract under which materials were supplied him, our obligation thereby became fixed and definite, viz.: That he should "promptly make payment" for such materials, *according to the terms of the contract under which they were furnished.* To such contract we *were* party—a surety for prompt payment in accordance therewith. While having no voice in its making, as soon as the contract with the brick company was made, we became concerned to see

that all brick supplied thereunder should be promptly paid for, according to its provisions. Instead of being separate and distinct from the contract of this surety, the contract between McIntyre and the brick company entered into and formed part of this surety's contract for prompt payment. Its provisions as to time of payment were necessary to determine the meaning of our obligation that McIntyre should promptly make payment.

Indeed, the very facts that, under the bond in question, the surety can not know, when executing it, who may become obligees thereunder, nor what may be the terms of the contracts which they may make with the principal, are *the strongest reasons why the rights of the surety should be carefully guarded and strictly enforced.*

It was also ingeniously argued that inasmuch as the surety had no right to be consulted as to the original term of credit to be given McIntyre by the brick company, which might have been until the dates reached by the extensions made, it can not complain if the same result is reached piecemeal. It is said, if it were competent in the first place for the brick company to make a contract with McIntyre calling for a payment in ninety days, for which payment at the end of the ninety days the surety would be liable, it was equally competent to make a contract for thirty days, at the end of this time to grant an extension for thirty days, and then to grant another extension of a like time.

Let us suppose A, being desirous of aiding his friend B to borrow money at a bank, should give to

the bank in advance a contract of guaranty in which he should bind himself as surety for the payment of such sum as the bank should lend to B, at such time as B and the bank should agree. B might give his note at thirty, sixty or ninety days, and A would be bound as surety, accordingly. If a thirty-day note were given, A's obligation would thereby be fixed and determined,—to pay the note at the end of thirty days if B did not. Now, if at the end of the thirty days the time of payment were by the bank, at the request of B and without the knowledge of the surety, extended for another thirty days, a new contract, to which the surety was no party, would be substituted for the one on which he was bound. It can not be said that such extension would work no change in the relations, rights or remedies of the surety. The right of the surety was to pay at the end of thirty days the debt of his principal then due, if his principal did not pay. Having so paid, he would be entitled to proceed immediately against his principal for reimbursement. If the time of payment were extended for a definite time, neither the principal nor his surety would have a right to pay until the expiration of such time; nor could the surety take action to protect himself until the expiration of such time.

> "The surety has a right, *when the debt is due according to the original contract*, to pay it, and immediately proceed against the principal for indemnity, and he is deprived of this right by such extension of the time of payment. As to this rule there is no conflict of authority among well-considered cases."
>
> 2 Brandt on Suretyship and Guaranty, section 342.

"Where time is thus given to the principal debtor by a valid agreement which ties up the hands of the creditor, though it be but for a single day, it is clear that the surety will be discharged. The principle is the same whether the time be long or short. The creditor must be in such a position that when the surety comes to be substituted in his place by paying the debt, he may have an immediate right of action against the principal. If that right can be postponed for a single day, it may be for a month or a year."

Bangs vs. Strong, 7 Hill (N. Y.), 250, 42.

Again, it was contended that surety companies are a species of insurance companies; that their suretyship is compensated instead of gratuitous, for which reason the usual rule of strict construction should not be applied to their contracts, but that, like contracts of insurance, they should be liberally construed.

The liability of a corporation, like that of an individual, is to be determined in each instance by the character of the contract into which it has entered. A surety company whose charter is broad enough can doubtless write certain kinds of insurance. For example, the plaintiff in error writes a burglary insurance policy and a policy insuring banks not only against burglary but against daylight robbery and hold-ups. If sued upon such a policy, it would be futile to claim the protection of the law of suretyship. The law of insurance would govern such a contract. If it enters into a contract of insurance its liability is that of an insurer. If, however, it becomes surety for the performance of another person's contract, its

liability is that of a surety, and is to be determined by the law of suretyship.

If an individual, before obligating himself as surety on the bond in question, had been paid for the use of his name, it would not be contended that for that reason he ceased to be a surety, or that his obligation became one of insurance, to be construed liberally. We perceive no good reason why the rule should be different when a soulless corporation does the same thing. True, in some few cases, courts have remarked that surety companies conduct a business similar to that of insurance companies; but it will be found that in every such case the contract under consideration, to which the surety company was party, was, in its essential features, an insurance contract. Contracts guaranteeing against loss from uncollectible debts, or from the dishonesty of employes, have been so construed. Such contracts differ in no essential particular from contracts guaranteeing against loss by fire or accident. To all such contracts there are but two parties, the insurer and the insured.

The contract embodied in the bond under consideration, on the contrary, is tripartite. It has three parties—McIntyre, principal, the brick company, obligee, and the surety company, surety. The latter's contract is not directly with the brick company, to pay for all brick furnished. That is McIntyre's contract. Our contract is collateral and auxiliary to McIntyre's—that if he does not promptly pay for such brick, we will. He remains the principal debtor; we are his surety.

Again, it was argued in the court below that, as the statute under which the bond in question was given is evidently intended as a protection to material men, who can have no mechanic's lien against a government building, as it takes the place of a right of lien, it is to be construed by the rules of law applicable to such liens. It might as well be contended that it is to be construed by the law of chattel mortgages.

A mechanic's lien is a statutory security, to the benefits of which certain persons may become entitled if they follow diligently the steps prescribed by the statute. The security afforded to material men under the bond in suit is a contract security. It is none the less a contract security because the contract is required to be entered into by the statute. It is still a bond, and the plaintiff in error is still a surety. When entered into it speaks for itself, and its meaning and the separate obligations incurred under it are to be determined by its language construed in the light of the contracts whose performance it secures. If this contract bond is to be construed by the law of mechanic's liens, as well might a real estate mortgage, given as security for an indebtedness or a contract, where no right to a lien existed, be said to be subject to the rules of law governing such liens.

To hold that congress intended by the statute under consideration to impose upon the surety upon the bond of a government contractor any additional or different obligation toward material men than the ordinary one of suretyship, is to do violence to the

language used. The act does not require those whom it names as "sureties" to enter into a direct contract with such material men to pay for materials furnished, or to pay at all events, under all circumstances, regardless of all transactions between such material men and the contractor. The terms employed are those properly and necessarily used to require security from the contractor that *he* will pay, without delay, when the time for payment arrives, for all material furnished him. The terminology is that of suretyship.

The act provides:

> "That hereafter any person or persons entering into a formal contract with the United States for the construction of any public building, or the prosecution and completion of any public work, or for repairs upon any public building or public work, shall be required, before commencing such work, to execute *the usual penal bond*, with good and sufficient *sureties*, with the *additional obligation* that such contractor or contractors shall promptly make payments to all persons supplying him or them labor or materials in the prosecution of the work provided for in such contract."
>
> 28 Stats. at Large, 278.

It was urged in the court below that no valid consideration appears for the alleged extension of time. The pleading is that there was an *express* agreement for extension of time, based upon a valid consideration. (Certificate, folio 5.)

The implied agreement of extension was based upon six different considerations, each one sufficient in itself to support the agreement, viz.:

1. The notes served to liquidate and render certain the amount of McIntyre's indebtedness to the plaintiff company.

Myers vs. Wells, 5 Hill (N. Y.), 463, 464.

2. They provided for interest at a higher rate than the account could draw under the statute.

3. The right to continue to receive interest upon different portions of the indebtedness for two definite periods of thirty and sixty days was a valuable one to the brick company.

Drescher vs. Fulham, 11 Colo. App., 62, 67, 68.

4. The tying of the hands of McIntyre so that he could not pay his debt and stop the running of interest until the maturity of the notes was a detriment to him.

5. The dating back of the larger note for fifteen days, during which time it bore interest, was an added burden upon McIntyre.

6. The right to have that portion of the indebtedness represented by the larger note draw interest for those fifteen days was an additional advantage to the brick company.

Thus, we submit, it has been clearly shown that the obligation of plaintiff in error to the brick company was the usual one of suretyship; that the con-

tract for the performance of which it was surety was changed, without its knowledge or consent; that such change, in law, worked its discharge from further liability to pay for brick theretofore furnished.

II.

The Second Question.

A SURETY IS DISCHARGED BY A CHANGE IN THE CONTRACT FOR THE PERFORMANCE OF WHICH HE IS BOUND, REGARDLESS OF WHETHER OR NOT HE IS DAMNIFIED BY SUCH CHANGE.

It was argued in the court below that the plaintiff in error, as surety, should not be heard to complain of the extension of time of payment granted its principal, for the reason that the total time of credit, including such extension, was not unreasonable, and that there was no pleading that the surety was injured thereby.

The law is that neither the reasonableness nor unreasonableness of such extension, nor the question of whether the extension would be a benefit or an injury to the surety, is to be considered. The rule is strict, that the surety has a right to insist that he shall be bound only by the terms of the contract upon which he has become surety, and that any subsequent alteration, after his liability has become fixed, if made without his consent, will release him.

"Nothing can be clearer, both upon principle and authority, than the doctrine that the liability of a surety is not to be extended by implication beyond the terms of his contract. To the extent, and in the manner, and under the circumstances pointed out in his obligation, he is bound, and no farther. *It is not sufficient that he may sustain no injury by a change in the contract, or that it may even be for his benefit.* He has a right to stand upon the very terms of his contract, and if he does not assent to any variation of it, and a variation is made, it is fatal."

Miller vs. Stewart, 9 Wheat., 680, 702, 703.

This leading case has been followed in a multitude of later cases in both the federal and state courts. See 2 Rose's Notes on U. S. Reports, 314.

"ANY *change in the contract, on which they are sureties, made by the principal parties to it without their assent, discharges them*, and for obvious reasons. When the change is made they are not bound by the contract in its original form, for that has ceased to exist. They are not bound by the contract in its altered form, for to that they have never assented. *Nor does it matter how trivial the change, or even that it may be of advantage to the sureties.* They have a right to stand upon the very terms of their undertaking."

Reese vs. U. S., 9 Wall., 13, 21.

"*Neither is it of any consequence that the alteration* in the contract is trivial, nor even that it *is for the advantage of the surety. 'Non hoec*

in feodera veni' is an answer in the mouth of the surety, from which the obligee can never extricate his case, however innocent, or by whatever kind intentions to all parties he may have been actuated."

Bethune vs. Dozier, 10 Ga., 235, 238.

"The enforcement of the rule governing the contracts of sureties, does not require that the surety shall be injured by the act of the creditor. *If the creditor interferes with the performance of the contract, and by such act authorizes or directs the principal to perform in some other way, the sureties are discharged, without regard to whether they were in fact injured by the interference.*"

Burley vs. Hitt, 34 Mo. App., 272, 276-277.

"If the creditor by agreement * * * gives time to the principal, without the assent of the surety, he thereby discharges the surety; and *the question is not whether the surety has sustained actual damage* or not by such an agreement. It is sufficient that his right to force the principal to an immediate payment or satisfaction has been suspended by the act of the creditor."

Norton vs. Roberts, 4 T. B. Mon. (Ky.), 491, 493.

Rees vs. Berrington, 2 Ves. Jun., 540; II White & Tudor's Lead Cas. in Eq., 1867, 1869.

Indeed, the authorities are entirely uniform on this proposition. No man is compellable to have benefits thrust upon him. Where a surety defends upon

the ground of change in the contract for the performance of which he was bound, without his consent, it is no answer to say that such change is beneficial to him, or that he is not injured thereby.

The major premise of our syllogism—that a surety is discharged by extension of time granted his principal without his consent—will doubtless be admitted. We submit that we have incontrovertibly established its minor premise—that the plaintiff in error stands toward the brick company in the relation of surety for another. The conclusion necessarily and inevitably follows that the extension of time granted McIntyre (obligor) by the brick company (obligee), being without the consent of the surety company (surety), released the latter from all liability then existing to pay for material theretofore delivered.

We respectfully submit that both of the questions propounded by the Court of Appeals should be answered in the affirmative.

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